BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY K. OGLE
Claimant
VS.

THE BOEING COMPANY - WICHITA
Respondent
AND

AETNA CASUALTY & SURETY
Insurance Carrier
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 162,918

ORDER

ON March 3, 1994, respondent's application for review of an Award by Special Administrative Law Judge William F. Morrissey dated January 6, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney, Steven R. Wilson, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, J. Philip Davidson, of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that listed in the January 6, 1994, Award of the Special Administrative Law Judge.

STIPULATIONS

The Appeals Board adopts for purposes of this appeal the stipulations described in the January 6, 1994, Award of the Special Administrative Law Judge.

ISSUES

The only issue raised and argued on appeal is the nature and extent of claimant's disability. The Appeals Board adopts all other findings made by the Special Administrative

Law Judge in his Award of January 6, 1994, not inconsistent with the specific findings made here.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the arguments by the parties and review of the record, the Appeals Board finds, for the reasons stated below, that claimant sustained a fifty-two percent (52%) permanent partial general disability as a result of an accidental injury arising out of and in the course of her employment with the respondent.

Claimant, a sheet metal worker at Boeing Military Airplanes, began experiencing problems with her right upper extremity in January of 1991. She was treated at Central Medical and placed on light duty. She returned to regular duty in the fall of 1991 and thereafter suffered problems with her left upper extremity as well. When her symptoms increased, she was seen by Dr. Lucas. In June 1992 Dr. Lucas diagnosed bilateral carpal tunnel but did not recommend surgery. His records indicate that her history suggested lateral epicondylitis as well but he could not confirm this diagnosis by examination.

Claimant testified that her symptoms continued to become worse until she left her employment at Boeing in April 1993. The record reflects that Dr. Lucas had recommended restrictions in September of 1992. Specifically, he had recommended she avoid use of vibratory tools and repetitive use of the hands. Dr. Lucas also had, on July 24, 1992, provided an evaluation of claimant's permanent disability. He concluded she has a three percent (3%) impairment of each hand which he combines to four percent (4%) to the body as a whole. Dr. Lucas's restrictions apparently were not made known to Boeing until April 1993, and once advised of the restrictions, Boeing terminated claimant's employment.

In December of 1992, Dr. Schlachter examined and evaluated claimant. He diagnosed overuse syndrome of both upper extremities with bilateral medial epicondylitis, bilateral deQuervain's disease, and tendinitis of both wrists with early carpal tunnel syndrome. In his opinion she has a ten percent (10%) permanent partial impairment of function to each upper extremity which equates to a total of twelve percent (12%) permanent partial impairment of the body as a whole. He recommended that she do no repetitive lifting over 20 pounds with either arm or hand. He also recommended that she do no repetitive pushing, pulling or gripping activities.

Both parties presented expert testimony regarding work disability. Karen Terrill testified on behalf of the respondent that based upon Dr. Lucas's restrictions claimant has a thirty-three percent (33%) loss of access to the open labor market and based upon Dr. Schlachter's restrictions a forty-seven percent (47%) loss of access to the open labor market. In calculating wage loss, she compared what she assumed was a $554.50 per week pre-injury wage with a projected $384.61 per week post-injury wage. The projected post-injury wage was based upon what claimant had earned at a job with Tallgrass Inn prior to her employment with Boeing. Claimant testified she believed she could perform the duties of that previous employment. At Ms. Terrill's deposition, the parties stipulated that claimant's average weekly wage in July 1992 was $868.00. Ms. Terrill was asked to calculate the wage loss assuming the pre-injury wage of $868.00 per week and with that assumption, she testified the wage loss would be fifty-six percent (56%). The Appeals Board notes parenthetically that the date of accident was disputed. The Appeals Board finds the evidence supports the finding by the Administrative Law Judge using July 24, 1992, as the date of accident.

Jerry Hardin testified on behalf of the claimant. In his opinion her ability to perform work in the open labor market has been reduced by forty-five to fifty percent (45-50%) based upon Dr. Lucas's restrictions, and sixty-five to seventy percent (65-70%) based upon Dr. Schlachter's restrictions. He projected a loss in ability to earn a comparable wage ranging from forty-one percent (41%) to fifty-eight percent (58%) depending on what pre-injury wage was used. He did not, however, have the $868.00 per week wage later stipulated to at Karen Terrill's deposition.

Permanent partial general disability is the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). No specific formula is required but consideration must be given to both factors when computing the extent of permanent partial disability. In this case, the Appeals Board agrees with the conclusion of the Special Administrative Law Judge that the restrictions recommended by Dr. Lucas probably understate, while the restrictions of Dr. Schlachter may overstate claimant's disability. Similarly, there appears no compelling reason to adopt the conclusion of either of the vocational experts relating to loss of access to the open labor market. Respondent does challenge Mr. Hardin's opinion on several basises. The most persuasive argument relates to the fact the computer program he uses over-values the repetitive use restrictions. While this appears to be true, his final opinions are of a lower labor market loss than reflected by the computer. Accordingly, the Appeals Board finds claimant has sustained a forty-seven percent (47%) loss of access to the open labor market based upon the averaging of the two vocational experts and their opinions based upon the two physicians.

The second factor in the disability calculation is the reduction of the ability to earn

a comparable wage. This requires a comparison of claimant's pre-injury wage with what it is projected claimant will be able to earn post-injury. Respondent argues that the pre-injury wage used for this calculation should not include fringe benefits or overtime. Respondent does so in part upon the basis of Karen Terrill's testimony that it is not possible to project what overtime or fringe benefits claimant would earn in her new employment. For the reasons expressed in Slack v. Tatis Development Corporation, 11 Kan. App. 2d 204, 718 P.2d 310 (1986), the Appeals Board disagrees. In that case the court was asked to determine the "diminution of earning capacity" for purposes of awarding benefits for an occupational disease. There, as here, the respondent argued that the calculation should be a comparison of hourly wages. The court rejected that contention and stated:

> "The 'average weekly wage' concept is the formula which is applicable in nearly every instance of computing compensation benefits....The concept would appear to us to be the basis upon which 'diminution of earning capacity' is computed. That is the difference between pre-disability average weekly wage and the capacity to earn a post-disability average weekly wage is the basis the statutory rate is applied."

The court goes on in the Slack decision to reject the contention that it was appropriate to assume that the post-injury fringe benefits would be the same as pre-injury. In the absence of evidence related to what the post-injury benefits and overtime might be, the court compares the pre-injury average weekly wage, including fringe benefits, with a post-injury wage which does not include fringe benefits. The decision to do so is based on a holding that respondent has the burden of showing what the post-injury wage is likely to be.

It is respondent's burden to produce evidence of fringe benefits and overtime which might increase that post-injury average weekly wage, and accordingly, reduce claimant's loss. It would be unreasonable to require claimant to produce expert opinion evidence contrary to its own interest. The Appeals Board is unwilling to conclude it will not be possible to project potential fringe benefits post-injury. To reach that conclusion is to effectively eliminate claimant's loss of fringe benefits as a factor in most cases. Accordingly, in this case, the stipulated pre-injury average weekly wage of $868.00 will be used for purposes of calculating the reduction in the ability to earn a comparable wage, and will be compared to a post-injury average weekly wage which does not include fringe benefits.

In determining the post-injury wage, on the other hand, the Appeals Board believes the respondent is correct in pointing out evidence of claimant's ability to perform his previous job at $346.15 per week. This was management or supervisory job for a local hotel. Claimant has testified that she could again do that type of work. While there is no specific evidence that she can return to her previous hotel employment, it is reasonable to project in this case that she will be able to earn a similar wage at a similar type of work. Accordingly, the $346.15 per week will be used as a projected post-injury wage and compared to $868.00 pre-injury to arrive at a reduction in ability to earn a comparable wage of fifty-six percent (56%).

The Appeals Board is not required to average the reduction in ability to earn a comparable wage with the reduction of the access to the open labor market. However, in this case, there appears no compelling reason to give greater weight to either factor and accordingly, the two will be averaged. The Appeals Board, therefore, finds that claimant has sustained a fifty-two percent (52%) permanent partial general disability.

AWARD

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of claimant, Mary K. Ogle, and against the respondent, Boeing Military Airplanes, and the insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained in January 1991 through July 24, 1992, and based on an average weekly wage of $868.00, for 7 weeks of temporary total disability compensation at the rate of $289.00 per week in the sum of $2,023.00 and 408 weeks of compensation at the rate of $289.00 for a fifty-two percent (52%) permanent partial general bodily work disability and the total award not to exceed $100,000.00.

As of June 6, 1994, there is due and owing claimant $2,023.00 in temporary total compensation and 90.57 weeks of permanent partial compensation at the rate of $289.00 per week in the sum of $26,174.73, making a total due and owing of $28,197.73.

The remaining compensation is to be paid at the rate of $289.00 per week until fully paid or further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed fifty percent (50%) against the respondent, and fifty percent (50%) against the Kansas Workers Compensation Fund to be paid direct as follows:

WILLIAM F. MORRISSEY		
Special Administrative Law Judge		$ 150.00
BARBER & ASSOCIATES		
Transcript of Regular Hearing		$ 195.35
DON K. SMITH & ASSOCIATES		
Deposition of Ernest R. Schlachter, M.D.		Unknown
DEPOSITION SERVICES		
Transcript of Preliminary Hearing		$ 74.60
Deposition of George Lucas, M.D.		$ 155.80
Deposition of Karen Crist Terrill		$ 192.00
	TOTAL	$ 422.40
IRELAND COURT REPORTING		
Deposition of Jerry D. Hardin		$ 281.30
Regular Hearing Continued		$ 162.67
	TOTAL	$ 443.97

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: Steven R. Wilson, 1861 N Rock Road, Ste 320, Wichita, Kansas 67206
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, Kansas 67202
J. Philip Davidson, 301 N Main, Ste 600, Wichita, Kansas 67202
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director